

STATEMENT OF THE CASE

Ronald Mitchell was convicted of Child Molesting, as a Class A felony; Child Molesting, as a Class C felony; and Intimidation, as a Class D felony. On direct appeal, this court affirmed his convictions. See Mitchell v. State, No. 79A05-0212-CR-618 (Ind. Ct. App. July 3, 2003) (“Mitchell I”). Mitchell subsequently petitioned for post-conviction relief, which the post-conviction court denied. He now appeals, challenging the post-conviction court’s judgment, and he raises the following issues for our review:

1. Whether he was denied the effective assistance of trial counsel.
2. Whether he was denied the effective assistance of appellate counsel.
3. Whether the Prosecutor committed misconduct at trial.

We affirm.

FACTS AND PROCEDURAL HISTORY

In Mitchell I, we set out the facts and procedural history as follows:

In the fall of 2001, G.E. resided in the same apartment complex as Mitchell. One evening when G.E. was at Mitchell’s apartment, Mitchell entered the bathroom with G.E., locked the door, instructed G.E. to pull down his pants and underwear and bend over the sink counter, rubbed his erect penis against G.E.’s buttocks, and then inserted his penis into G.E.’s rectum. Mitchell suddenly stopped when one of G.E.’s sisters knocked on the bathroom door. Mitchell threatened G.E. that he would harm him if he revealed what had just happened, and then Mitchell and G.E. exited the bathroom. Later that same evening, G.E.’s father instructed G.E. to retrieve a book from their apartment. Mitchell accompanied G.E. on this task. After the two entered the apartment, Mitchell locked the door and pulled his pants and underwear down. G.E. attempted to go upstairs, but Mitchell pulled him back by his arm. Mitchell then pulled G.E.’s pants and underwear down, sat down on a footstool, and pulled G.E. onto his lap, thereby forcing his penis into G.E.’s rectum. After this, G.E. went upstairs. When he came back downstairs, Mitchell took G.E.’s hand and made him touch Mitchell’s penis. G.E. observed a “snot”-like discharge on the tip of Mitchell’s penis. Tr. p. 70-71. Mitchell again threatened to harm G.E. if he

told anyone about what had transpired. Despite the threats of harm, G.E. eventually confided in his sister about what Mitchell did, the police were informed, and G.E. was taken to the emergency room for an examination. Tests revealed that G.E.'s rectum was infected with gonorrhea, a disease that is transmitted through close sexual contact. Shortly thereafter, Mitchell went to the emergency room complaining of intense stomach pain. While there, Mitchell informed the emergency room physician that he had previously observed a discharge coming from his penis, that he took some of the medication his girlfriend had for the treatment of her gonorrhea, and that the discharge cleared-up.

The State charged Mitchell with three counts: Child Molesting as a Class A felony, Child Molesting as a Class C felony, and Intimidation as a Class D felony. While incarcerated pending trial, Mitchell confided in his bunkmate, Jeffrey Simmons, that he had sex with his victim in a bathroom and that he had previously contracted gonorrhea but had taken his girlfriend's medication to rid himself of it. Additionally, Simmons drafted several letters on Mitchell's behalf, one of which instructed Mitchell's girlfriend to tell people that he had a groin injury during the time in question and could not have had sex during that time. Simmons testified at Mitchell's bench trial. Additionally, at trial and over Mitchell's objection, Mitchell's medical records and testimony from the physician to whom Mitchell had disclosed his self-treatment of gonorrhea were received into evidence. The trial court found Mitchell guilty on all three counts and sentenced him to fifty years incarceration.

(Footnotes omitted). On appeal, this court affirmed Mitchell's convictions. And the post-conviction court denied Mitchell's petition for post-conviction relief following a hearing. This appeal ensued.

DISCUSSION AND DECISION

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999), cert. denied, 529 U.S. 1088 (2000). To the extent the post-conviction court denied relief in the instant case, Mitchell appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole

“leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court.” See Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)), cert. denied, 529 U.S. 1113 (2000). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000).

Issue One: Ineffective Assistance of Trial Counsel

Mitchell first contends that he was denied the effective assistance of trial counsel. There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney’s performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. Even if a defendant establishes that his attorney’s acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel’s errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989).

On appeal, Mitchell asserts that his trial counsel was ineffective for: (1) failing to adequately investigate the facts of his case; (2) failing to present evidence that Mitchell

tested negative for gonorrhea; (3) failing to determine that Mitchell was mentally retarded and unable to assist in his defense; (4) failing to locate, interview, or depose key witnesses; (5) failing to timely file a defense witness list; (6) failing to object to the violation of his physician-patient privilege; and (7) coercing Mitchell into waiving his right to a jury trial. The post-conviction court concluded that Mitchell did not satisfy his burden of proof on each claim.

In particular, the evidence shows that Mitchell's trial counsel conducted an appropriate examination of the facts of the case; argued that Mitchell had tested negative for gonorrhea; found Mitchell mentally competent to assist in his defense;¹ interviewed key defense witnesses prior to trial; and filed the defense witness list as soon as Mitchell provided him with names. Mitchell has not demonstrated that any objection to the alleged violation of his physician-patient privilege would have been sustained, so he cannot show prejudice on that claim. Finally, Mitchell has not presented any evidence to support his claim that Mitchell coerced him into waiving a jury trial. Indeed, on appeal, Mitchell does not direct us to relevant evidence supporting any of his specific contentions.

As the post-conviction court found, Mitchell's trial counsel was thoroughly prepared for trial, cross-examined Simmons regarding his motives for testifying against Mitchell, and otherwise competently defended Mitchell at trial. Mitchell has not satisfied

¹ There is a document included in the appendix purporting to show Mitchell's low IQ, but there is no indication that this document was submitted to the post-conviction court. As such, we cannot consider that evidence in our review. Regardless, Mitchell assured the trial court that he had never been treated for any mental illness and did not suffer from any mental or emotional disability.

either prong under Strickland. We agree with the post-conviction court that Mitchell has not demonstrated that he was denied the effective assistance of trial counsel.

Issue Two: Appellate Counsel

Mitchell also contends that his appellate counsel was ineffective. The standard for determining the effective assistance of appellate counsel is the same as for allegations of ineffective assistance of trial counsel. Gann v. State, 570 N.E.2d 976, 977-78 (Ind. Ct. App. 1991), trans. denied. The crux of Mitchell's argument consists of the following:

In this case, appellate counsel failed to properly argue that the testimony of the jailhouse informant was unreliable evidence with which to overcome the doctor-patient privilege. In this case there was no substantial evidence to overcome the natural presumption that the testimony of the jailhouse informant, who had numerous felony convictions, had been fabricated in exchange for personal favors and benefits.

Brief of Appellant at 30.

Mitchell has not supported his argument on this issue with citations to the record. Nor has he supported his contention with cogent reasoning. As such, the issue is waived. Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, the record supports the post-conviction court's determination that Mitchell was not denied the effective assistance of appellate counsel.

Issue Three: Prosecutorial Misconduct

Finally, Mitchell contends that the Prosecutor committed misconduct during trial. But that issue is also waived. Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001), cert. denied, 537 U.S. 839 (2002). Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Id. If

an issue was known and available, but not raised on direct appeal, it is waived. Id.; see also Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (noting claims of fundamental error raised in post-conviction petition but known and available on direct appeal are waived). The alleged prosecutorial misconduct was known and available to Mitchell on direct appeal, and Mitchell makes no assertion to the contrary in his petition for post-conviction relief. As such, the issue is waived. See id.

Affirmed.

DARDEN, J., and BROWN, J., concur.